DUDLEY KNOX LIBRARY
NAVAL POSTGRADUATE SCHOOL
MONTEREY CA 93943-5101

THE USE OF FORCE BY THE UNITED STATES TO PROTECT FOREIGN NATIONALS

by

Alexander W. Whitaker IV

A graduate paper submitted in partial fulfillment of the requirements for the degree of

Master of Laws (International and Comparative Law)

and in partial fulfillment of the course requirements of the International Law Seminar (Use of Force)

Professor Jane Stromseth

Georgetown University Law Center

April 1996

Thesis
W5504
c.1

DUDLEY KNOX LIBRARY
NAVAL POSTGRADUATE SCHOOL
MONTEREY CA 93943-5101

THE USE OF FORCE BY THE UNITED STATES TO PROTECT FOREIGN NATIONALS

Alexander W. Whitaker IV

By late 1992, as the famine in Somalia worsened and the inability of the world community to respond became ever more apparent, the Bush administration decided to commit U.S. troops to help create a secure environment for the delivery of relief supplies to that troubled country. What would be known as Operation Restore Hope was announced by President Bush on December 4, 1992.[1] It followed United Nations endorsement of the plan the previous day in Security Council Resolution 794.[2]

Before the announcement of Operation Restore Hope the Attorney General had provided President Bush the advice of the Department of Justice's Office of Legal Counsel as to the legality of undertaking such an operation without explicit Congressional authorization. In his cover letter to that opinion, Attorney General William P. Barr concluded that President Bush indeed had authority in his "constitutional role as Commander in Chief and Chief

---

[1] J. Hirsch & R. Oakley, *Somalia and Operation Restore Hope: Reflections on Peacekeeping and Peacemaking* 46 (1995).
[2] U.N. Sec. Counsel Res. 794 (3145th mtg.) at U.N. Doc. S/RES/794 (1992).

Executive" to undertake the operation.[3] In addition to citing the President's authority for the operation under international law-specifically UN Security Council Resolution 794--Barr cited the President's authority to use American forces for the protection of U.S. troops already in Somalia and, generally, for the protection of U.S. nationals.[4]

Interestingly, however, both the Attorney General in his letter and the Office of Legal Counsel (OLC) in its opinion found justification for the President's proposed action in the protection of *foreign* nationals as well. "I further conclude," wrote the Attorney General, "that you have authority to use those military personnel to protect Somalians and other foreign nationals in Somalia."[5] While not stated explicitly, the clear implication of his statement was that the President could commit U.S. forces for the protection of non-U.S. nationals without the consent or authorization of Congress. That implication is clearer still in the accompanying OLC opinion.[6]

---

[3] 16 U.S. Op. Off. Legal Counsel 6 (1992) [hereinafter OLC Somalia opinion].

[4] U.S. nationals were present in Somalia before the beginning of Operation Restore Hope as participants in international relief efforts already underway. There were American civilians in country working with relief organizations. In addition, there were U.S. military personnel in Somalia in connection with Operation Provide Relief, the U.S.-coordinated transport (primarily by air) of humanitarian relief to Somalia. There was at the time considerable concern about the safety of all of these persons, as neither the airport at Mogadishu nor other staging areas had been secured.

[5] *Id.* at 7.

[6] *Id.* at 8.

The OLC opinion outlines and discusses the various grounds on which the President could take action under his power as Commander in Chief. The opinion recounts the domestic sources usually cited when asserting the President's authority to use military force for the protection of U.S. nationals abroad.[7] It stresses the President's authority to use troops in support of a UN Resolution, and notes the tacit contemplation of the Congress that the President might use U.S. forces in the Somalian crisis.[8]

Of principle interest with respect to this paper's subject, however, is the following language of the OLC opinion:

> Nor is the President's power strictly limited to the protection of American citizens in Somalia. Past military interventions that extended to the protection of foreign nationals provide precedent for action to protect endangered Somalians and other non-United States citizens.[9]

---

[7] *E.g. U.S. v. Verdugu Urquidiz*, 494 U.S. 259, 273 (1990), *cited in* OLC Somalia Opinion 9 (1992).

[8] OLC Somalia Opinion at 12-14. Even though the Security Council Resoluton "authorized" the use of force, rather than obliged the U.S. to use its military forces in support of the Somalia operation, the OLC opinion stresses the Korea War precedent of the President committing forces without prior Congressional authorization. A U.N. Resolution, the OLC opinions says, can furnish an independent ground for Presidential use of force abroad. *Id.* Although this broader subject is outside the scope of my paper, it should be noted that this assertion of Presidential authority via U.N. Resolution is far from accepted, particularly by the Legislative Branch.

[9] *Id.* at 11.

The opinion then cites as precedent U.S. actions in the Dominican Republic in 1965 and during the Boxer Rebellion in China in 1900 and 1901.[10]

What is not readily apparent from the Attorney General's letter or the OLC opinion is the extent to which the protection of foreign nationals was offered as an *independent* ground to justify U.S. force without Congressional authorization. While other legal bases for such military action were put forth in the opinion, each was proffered as if it provided a legal basis for action independent of the others. I will assume for purposes of this paper that the protection of foreign nationals is being offered as an independent justification for the President's use of force without Congressional consent, and with the presumption that the Department of Justice views such use of force as valid under international law.

The pages which follow will explore whether in the President's constitutional roles as Commander in Chief and Chief Executive he may use military force for the protection of non-U.S. nationals in the same way he might be able to do for the protection of U.S. nationals. I will consider the extent to which the War Powers Resolution confirms or alters his constitutional prerogatives in this regard. I will

---

[10] *Id.*

attempt to identify the legal rationales supporting arguments for such a use of force, and evaluate whether they are defensible under post-U.N. Charter notions of international law.

The assertion of a right to intervene for the protection or rescue of nationals not of one's own state carries with it many difficult questions. If permissible, to what extent would such action be predicated on the request, permission or acquiescence of the threatened nationals' home state? What would prevent such a right of intervention from being expanded in practice to justify all manner of violations of sovereignty? Would such a right of intervention to protect foreign nationals permit intervention in the affected nationals' own state as well as a third location? There are also difficulties with *not* recognizing a limited right to protect foreign nationals, both from political and humanitarian perspectives. These are questions I will address as I consider the possible legal grounds for the use of force for the protection of foreign nationals, and as I attempt in closing to define a limited doctrine of using force for the protection of foreign nationals by the United States.

CONSTITUTIONAL CONSTRAINTS ON THE PRESIDENT'S ABILITY TO USE FORCE TO PROTECT FOREIGN NATIONALS

The Constitution certainly does not address which branch of the U.S. Government can authorize the use of military force to protect foreign nationals. Indeed, the fledgling nation's near universal desire to avoid foreign entanglements, its limited military resources and more pressing security concerns (the British, the French, the Spanish, the Indians) suggest that using forces to protect *another* nation's nationals was probably not a subject seriously discussed by the Founders. To determine where the Constitution rests authority for such actions, then, one must inevitably consider the larger questions as to which branch of Government generally has the right to authorize the use of military force.

The question, then, like so many others in this area, becomes a subset of the larger "invitation to struggle" left us by the Founders when they placed with the Legislative Branch the power to declare war,[11] and with the Executive the responsibility of Commander in Chief of the

[11] U.S. Const. Art I §8, cl. 11 ("To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water").

Armed Forces.[12]

While a thoroughgoing review of this larger debate is outside the scope of this paper,[13] it is worthwhile to consider where the Framers considered the outside limits of the Executive's scope of action to be in this shared responsibility.

The draft Constitution gave the Legislative Branch the power to "make war." This was, on motion of James Madison, changed to "declare war," to preserve for the Executive "the power to repel sudden attacks."[14] It was sudden attacks that concerned the drafters, that is, those attacks whose fury or imminence precluded legislative debate and authorization in order to be successfully repelled. The Framers left to the Congress the power to initiate war. [15] There is no suggestion that Congress left to the Executive other uses of force: as both Abraham Sofaer and Peter Raven-Hansen note, the Constitution gave the Congress the power to grant letters of marque and reprisal, which encompassed

---

[12] U.S. Const. Art II §2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States…").

[13] Indeed, Peter Raven-Hansen observes that by the early 1990s the subject had been discussed by more than 50 books and 250 scholarly articles. Peter Raven Hansen, Constitutional Constraints: The War Clause, in G. Stern & M. Halperin , eds., *The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives* 29 (1994). For a thorough overview of the Framers' views, *see* Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale L.J. 672 (1972).

[14] Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins 31 (1976).

[15] *See* Lofgren, *supra* note 13.

those uses of force short of formal war common then.[16] As Judge Sofaer further notes, however, the Article I, Section 10 restraint on states engaging in war "unless actually invaded, or in such imminent danger as will not admit of delay" logically suggests "[o]ne can reasonably contend that at least this much power must be vested in the President to protect the United States as a whole."[17]

Beyond this general guidance, the Constitution speaks little to the division of responsibilities between the Executive and Legislative Branches concerning the use of military force. The Framers, perhaps intentionally by their generality and their distribution of powers in this area, indeed left to their successors to decide how this power would be shared, in light of contemporary security concerns.

The Federalist Papers do little more than the Constitution to answer the question. The articles comprising the Federalist Papers were designed principally to answer objections to the proposed Constitution from a skeptical public, those objections largely being concerns about a national government with enhanced powers over that under the Articles of Confederation, and the introduction of a strong executive. To the extent the Federalist Papers speak to matters of national defense, the effort of the

---

[16] Peter Raven-Hansen, *supra* note 13, at 30, 31, and Sofaer, *supra* note 14, at 4.
[17] Sofaer, *supra* note 14, at 4.

writers is often given to convincing the reader that there should be a "common defence" coordinated by a national government in the first place, and that the national government should be properly equipped for that purpose.[18] The writers were attempting to convince their readers that the indefinite power to maintain armies, even in peacetime, was necessary.[19] The writers maintained in their articles the relatively straightforward dichotomy between declaring war (the Congress's responsibility) and directing war or repelling sudden attacks (the President's responsibility). Hamilton stressed the importance of the strong Executive. "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand," Hamilton wrote in Federalist 74. "The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority."[20] In Federalist No. 70 Hamilton defended a "vigorous" Executive: "Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign

---

[18] The Federalist No. 23 (A. Hamilton).
[19] The Federalist No. 41 (J. Madison).
[20] The Federalist No. 74 (A. Hamilton).

attacks…."[21] To a public suspicious of a strong executive, though, it was hardly likely that even Hamilton would argue that the Executive under the new Constitution would be empowered to use force without the involvement of the Legislative Branch.

In none of the records of the Convention or in the Federalist Papers is there to be found the suggestion that the Executive acts independently of the Legislative Branch in matters military, or that the involvement of Congress was limited to only those situations in which formal war was declared. As Judge Sofaer notes, "Congress was seen by all who commented on the issue as possessing exclusive control of the means of war. No ratifier suggested that the President would be able unilaterally to utilize forces provided for one purpose in some unauthorized military venture. Undeclared wars were far too important a part of the international scene for on safely to assume that the Framers and ratifiers meant to leave that area of power to the President."[22]

If we accept that the Framers intended the President to have the power to "repel a sudden attack," it is worthwhile to ask how the Framers might have viewed the Executive's use of force to protect foreign nationals under that grant of

---

[21] The Federalist No. 70, at 454 (A. Hamilton) (Modern Library College Edition, n.d.).
[22] Sofaer, *supra* note 14, at 56.

authority. It is difficult, if not impossible, to see how the use of force to protect foreign nationals, *per se*, can be equated with "repelling a sudden attack" on the United States. While it is true that such protection or rescue might have the compelling suddenness that begs for prompt action, while not allowing for thorough legislative deliberation, it does not thereby follow that the action shares the extreme national interest for self-preservation as does an attack on the nation itself. While there may be circumstances where such intervention will go hand-in-glove with an action for self-preservation, it is generally difficult to argue that the assistance of foreign nationals rises to such a stature.[23]

In this respect, the use of force for the protection of foreign nationals differs conceptually from the use of force by the United States to protect its own nationals. In protecting its own nationals the United States extends to its threatened citizens the protection they would expect if similarly threatened by a foreign sovereign were they within

---

[23] One situation where the rescue of a foreign national could rise to an act of national self-preservation might be action taken to protect a national who is acting as the nation's agent in a matter of national security. For example, a state might find it necessary to protect an intelligence operative who possesses information that if discovered could imperil the national security. There, although the nexus of citizenship would be lacking, an arguably as strong a connection would exist between the foreign national and the state which seeks to protect him. Another example where the "nationality" nexus would be lacking, but where the connection with the state would be unquestionable, is the case of U.S. enlisted servicemembers who are not U.S. citizens.

their own country. The attack on the U.S. national is viewed as an attack on the U.S. itself, an affront to its sovereignty. As Ian Brownlie observes, "The theory behind this seems to be that the nationals of a state are an extension of the state itself, a part as vital as the state territory, and that the *raison d'être* of the state is the protection of its citizens."[24] In the leading federal case dealing with actions taken to protect citizens abroad, the U.S. Circuit Court of Appeals for the Southern District of New York in 1860 wrote:

> Now, as it respects the interposition of the executive abroad, for the protection of the lives or property *of the citizen*, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence *to the citizen or his property*, cannot be anticipated and provided for; and the protection to be effectual or of any avail, may, not unfrequently require the most prompt and decided action. Under our system of government, *the citizen abroad* is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty, and property *of the people composing it*, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty is not worth preserving. [Emphasis added.][25]

The forcefulness of the court's language with respect to the Executive taking action to protect the nation's *citizens* abroad seems to underscore the many ways such lofty

---

[24]Ian Brownlie, *International Law and the Use of Force By States* 289 (1963).

[25] *Durand v. Hollins*, 8 F. Cas. 111, 112 (No. 4186)(C.C.S.C.N.Y 1860).

responsibilities would be lacking were the Executive seeking to take action to protect foreign nationals.

The only Supreme Court case discussing the Executive's use of force to protect a foreign national is *In re Neagle*,[26] an 1890 case concerning whether a U.S. deputy marshal (Neagle) had the statutory authority to defend a Supreme Court justice (Stephen J. Field) by killing the latter's assailant. Neagle, as a result of his action, was charged with homicide and held in custody by one Sheriff Cunningham. The Court, in finding the warrant holding Neagle unconstitutional, discusses in broad language the supremacy of the national government, and its responsibilities to take measures to protect judges and to execute the laws faithfully.

In this context, the Court notes the 1853 case of Martin Koszta, a Hungarian who had made his declaration of intent to become a U.S. citizen, but had not yet become naturalized. The court recounts that

> While in Smyrna [Koszta] was seized by command of the Austrian consul-general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Capt. Ingraham, in command of the American sloop of war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent

---

[26] *Cunningham, Sheriff, v. Neagle (In re Neagle)*, 135 U.S. 1., 10 S.Ct. 658, 34 L.Ed. 55. (1890)

> bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, secretary of state, and Chevalier Hulsemann, the Austrian minister at Washington, which arose out of this affair, and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention; and the position assumed by Mr. Marcy met the approval of the country and of congress, who voted a gold medal to Capt. Ingraham for his conduct in the affair.[27]

The Court characterizes the episode as "one of the most remarkable in the history of our foreign relations"[28] and "an attractive historical incident."[29] It closes its discussion of the case by asking: "Upon what act of congress then existing can any one lay his finger in support of the action of our government in this matter?"[30]

Perhaps given this last rhetorical question and the lack of other Supreme Court precedent on the question of executive decisions to use force to protect non-U.S. nationals, it is understandable that the OLC opinion on Somalia would cite this case.[31] The case ultimately, however, does little to support the notion that the Executive can intervene for the protection of foreign nationals without the involvement of Congress. Indeed, the

---

[27] 135 U.S. 1, 64, 10 S.Ct. 658, 668.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] OLC Somalia Opinion at 14, n.3.

whole thrust of the Neagle case is the responsibility of the national government to protect its officials and agents, *those with extremely strong ties to the government*. The Court's approving discussion of the Koszta episode was premised on Koszta's apparent nexus to his country of choice by his having filed a declaration of intent. The Court, seeking to illustrate the national government's inherent responsibilities to protect its officers and agents, would hardly have used the case had this nexus been lacking. It is difficult indeed to extrapolate the case of almost-citizen Koszta to that of a starving Somali or other foreign national lacking any personal connection to the United States, and certainly a stretch to use the Supreme Court's illustrative use of the episode for one proposition to fashion a rule of law for another.

The courts, then, like the Constitution, fail to give any compelling Constitutional basis for the Executive using force without the participation of Congress for a purpose short of repelling attack, either against the United States or, by extension, its citizenry. Absent that authority, it is difficult to discern any Constitutional basis for the President's using force without Congressional involvement solely for the protection of foreign nationals.

POSSIBLE STATUTORY LIMITS ON THE PRESIDENT'S USE OF FORCE TO PROTECT FOREIGN NATIONALS WITHOUT AUTHORIZATION OF CONGRESS

Prior to passage of the War Powers Resolution, there was one statute that could be read as addressing this subject.[32] The Act of July 27, 1868 addresses the unjust imprisonment of U.S. citizens by foreign governments. Now popularly referred to as the "Hostage Act," the statute directs the President, when such imprisonment appears to be wrongful and in violation of the rights of American citizenship, to demand the citizen's release, and if the release is not forthcoming, the President "shall use such means, *not amounting to acts of war* as he may think necessary and proper to obtain or effectuate the release."[33] [Emphasis added.] While it is not clear what Congress meant by means "not amounting to acts of war," one could argue that Congress by this statute specifically reserved unto itself the decision to use force to effect the release of an imprisoned citizen. Applied to the Koszta case, or even to the case of the Iranian hostage rescue attempt, one could argue that the Executive was precluded from action absent

---

[32] Act July 27, 1868, c. 249, s.3, 15 Stat. 224. Now codified at 22 U.S.C. §1732.

[33] *Id.* Note that in 1989 Congress added "and not otherwise prohibited by law" after "not amounting to acts of war." 22 U.S.C.A. §1732 (1996) hist. note.

Congressional authorization to the contrary.[34] Further, one could argue that as Congress has spoken in this area, authorizing the President to act, but only in the case of citizens abroad, and then with constraints, the Executive is thereby not free to act outside that authorization for the protection of foreign nationals without a compelling and vital national security interest analogous to repelling a sudden attack.

The basis for the Executive using force to protect foreign nationals without Congressional authorization is more problematic in light of the 1973 War Powers Resolution. Section 2 of the Act, which enunciates the purpose and policy of the resolution, purports to define the limits of the President's constitutional powers as Commander in Chief to introduce U.S. forces into hostilities, or situations "where imminent involvement in hostilities is clearly indicated by the circumstances."[35] Those situations, say

---

[34] Given the considerable historical precedent for Presidential use of force to rescue or protect U.S. citizens, however, it is more likely that Congress contemplated the President's use of limited military force, in addition to diplomatic tools, to effect the release of endangered Americans. *See*, A. Mikva & J. Neuman, *The Hostage Crisis and the 'Hostage Act,'* 49 U.Chi.L.Rev. 292. In the authors' comprehensive review of the legislative history of the Act they note that "The President is given broad discretion in choosing among diplomatic military and economic means of bringing pressure or influence to bear on a foreign state that has imprisoned American citizens unlawfully. His response must be within constitutional bounds, must not amount to an act of war…." *Id.* at 344. The authors note that the legislative history is "almost entirely unilluminating" with respect to the words "not amounting to acts of war, *id.* at 302, but describe the enactment of the bill as motivated not by a desire to limit the President's authority, but to encourage Executive action. Still, they note, there is nothing in the legislative history to suggest Congress was attempting to shift any Constitutional prerogatives.

the resolution, are only three: "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[36] Of the three, only the last affords the President latitude to act without authorization of Congress. It is difficult to see how under this narrow remit the President could employ U.S. forces to protect or rescue foreign nationals, if the situation clearly implies the possibility of hostile action.

The constitutionality of portions of the War Powers Resolution has been debated since its inception. While the joint resolution itself states that nothing in the resolution "is intended to alter the constitutional authority of the Congress or of the President,"[37] clearly the view of the Executive has been that "the resolution defin[es] the President's powers in ways which would strictly limit his constitutional authority."[38] While the Executive has taken the view that "This policy statement is not to be viewed as limiting presidential action in any substantive matter,"[39] it is clear that limits on Presidential action are exactly what Congress intended in

---

[35] 50 U.S.C. §1541(a).
[36] 50 U.S.C. §1541(c).
[37] 50 U.S.C. §1547(d)(1).
[38] President Nixon's Message to Congress Vetoing the War Powers Resolution, 9 Weekly Comp. Pres. Doc. 43 (Oct. 24, 1973).
[39] 4A U.S. Op. Off. Legal Counsel 185 (1980)("Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization").

attempting to codify the powers of the Commander in Chief.

There has been debate whether the language of Section 2 of the Act purports to be exhaustive or not. The use of the word "only" certainly suggests Congress intended the three situations outlined to be the only ones in which the President in its view could use force. Noticeably absent from that list, however, is the President's ability to use force to protect or rescue American citizens abroad. (This can be argued as evidence that Congress obviously did not mean the list to be exhaustive, or else it would have listed the protection or rescue of Americans.)

Interestingly, the Senate version of the resolution would have allowed the President to introduce forces into potentially hostile situations:

> to protect while evacuating citizens and nationals of the United States, as rapidly as possible from (A) any situation on the high seas involving a direct and imminent threat to the lives of such citizens and national, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country…[40]

---

[40] S. 440, 93rd Cong., 1st Sess. (1973), *reprinted in* T.M. Franck & M.J. Glennon, Foreign Relations and National Security Law: Cases, Material and Simulations 586, 587 (2d ed., 1973).

Even under this more expansive recognition of Presidential authority to use force (which was rejected) the President in Congress' view only had authority to use force to protect U.S. nationals.

In testimony in 1975 before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, State Department Legal Advisor Monroe Leigh was questioned about the legality of using U.S. forces for rescuing Americans in Indochina. He confirmed the Executive's view that such action was within the President's constitutional authority.[41] During the hearings he was asked by Representative Stephen Solarz, "Can you think of any situation in which the President would have an inherent constitutional authority to commit American forces to combat situations that are not listed in section 2(c) of the bill other than a situation in which he is attempting to rescue American nationals from a situation when they are in jeopardy?" Leigh later provided his answer for the record:

> Besides the three situations listed in subsection 2(c) of the War Powers Resolution it appears that the President has the constitutional authority to use the Armed Forces to rescue American citizens abroad, *to rescue foreign nationals where such action directly facilitates the rescue of U.S.*

---

[41] War Powers: A Test of Compliance: Hearings Before the Subcommittee on International Security and Scientific Affairs, House Committee on International Relations, 94th Cong., 1st Sess. (1975), *reprinted in* Franck & Glennon, *supra* note 40, at 603, 604.

> *citizens abroad*, to protect U.S. Embassies and Legations abroad, to suppress civil insurrections, to implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States, and to carry out the terms of security commitments contained in treaties. We do not, however, believe that any such list can be a complete one, just as we do not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander in Chief authority could be exercised.[Emphasis added.][42]

Even though Leigh stressed the non-exhaustive character of his list, it is interesting that when describing the Executive's use of force to protect foreign nationals he limited it to situations in which such action was not merely co-incident with the rescue of American nationals, but actually *facilitated* such rescue. This certainly is a much more narrow assertion of the President's constitutional power to use force for this purpose than that claimed by the Office of Legal Council's Operation Restore Hope opinion.[43]

The issue of the permissibility of using force to rescue foreigners arose again in the 1977 hearings of the Senate Foreign Relations Committee considering proposed amendments to the War Powers Resolution. In his testimony, then-Professor Abraham Sofaer, generally a defender of the President's prerogatives as Commander in Chief, suggested that amending Section 2(c) of the resolution to include the

---

[42] *Id.* at 606.
[43] OLC Somalia Opinion at 11.

protection of Americans and the power to forestall direct and imminent threats of attack on the U.S. would "essentially permit, in advance almost all the uses of force ever undertaken by a President."[44] He noted, though, that if the statute were then read as exhaustive rather than merely illustrative, what it "most clearly seems to prevent is the use of force to protect or rescue foreign nationals." "On this point," Sofaer continued, "though Presidents might be constitutionally empowered in some situations to protect foreign nationals, as Jefferson and Madison did, Congress could in my judgement limit this power."[45] He later suggests that a fund cut-off by Congress directed at an efforts such as rescuing foreigners would be "unlikely to pose any constitutional difficulty,"[46] suggesting that to the extent the President had any authority to undertake such operations, they could be limited simply by a restriction on funding. If, as Sofaer suggests, there is no constitutional problem with Congress by its power of the purse precluding a President from taking action to rescue foreigners, it is difficult to argue that the President has an inherent Constitutional power to use force unilaterally for that purpose.

---

[44] War Powers Resolution: Hearings Before the Senate Committee on Foreign Relations , 95th Cong. 1st Sess. (1977), reprinted in Franck & Glennon, *supra* note 40, at 612.
[45] *Id.*
[46] *Id.* at 613.

The War Powers Resolution was not amended to expand the provisions of Section 2(c). Moreover, the already questionable constitutionality of some portions of the War Powers Resolution were cast into further doubt by the Supreme Court's 1983 ruling in *I.N.S. v. Chadha*,[47] which invalidated the legislative veto. To the extent the War Powers Resolution incorporates a legislative veto (by its provisions for overriding Presidential action by concurrent resolution), it would be unlikely to survive scrutiny under the principles of the *Chadha* decision. This does not mean, however, that other provisions of the Resolution would similarly be invalid.

In the end, the War Powers Resolution makes little difference as to the existence of an Executive right to employ forces for the protection of foreign nationals. If that prerogative existed before the Resolution, it is unlikely that the Resolution changes it, particularly in view of its omission of other traditional uses of force by the Executive, such as that for the rescue of American citizens. If, on the other hand, the President did not before 1973 have the authority to use troops in such a fashion without the participation of the Congress, the War Powers Resolution does little to change that, save perhaps to invite a confrontation after 60 days or upon concurrent

[47] 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

resolution of the Congress, should the operation not have been completed and Congress object. What the debate about the War Powers Resolution does add to this discussion is the clear impression that the 1992 OLC opinion goes much farther than previous statements on the subject by the State Department and even by scholars with a generally sympathetic view toward Presidential latitude in matters of foreign relations and the use of force.

USE OF FORCE TO PROTECT FOREIGN NATIONALS: SOME EXAMPLES OF U.S. PRACTICE

Both in evaluating Presidential claims of authority to use force for the protection of foreign nationals without Congressional approval, and in considering the acceptability of such a use of force under international law, it is essential to review actual U.S. practice in the area. The number of times force has been employed since the country's founding has been catalogued at over 200,[48] with a considerable portion of those involving unilateral Executive action, and few involving a declaration of war. A sizable percentage of those actions involved intervention to protect American nationals. Milton Offut records at least seventy

[48] Raven-Hansen, *supra* note 12, at 29 & n. 3 at 46, *citing* Ellen C. Collier, Instances of Use of United States Armed Forces Abroad, 1798-1989 (Congressional Research Service, 1989).

such instances between 1813 and 1927.[49] Although I have found no thoroughgoing compilation of instances the U.S. has used force to protect foreign nationals, the number of times is undoubtedly far smaller.

Aside from intervention pursuant to mutual defense treaties, U.S. military action to protect or rescue foreign nationals has almost always--if not always--been associated with some other usually more important foreign policy objective. To the extent that both protection of U.S. nationals and protection of foreign nationals have been offered as rationales for military intervention, the protection of foreign nationals has always been the secondary concern. While it is the case, as the OLC opinion suggests, that the U.S. has offered "protection of foreign nationals" as a basis justifying the use of force, I am unable to identify a single instance in which that was the sole justification, or even the primary justification for such action. In short, while the rationale has been offered on occasion to bolster the claim that use of force was justified, the U.S. has evidently never felt sufficiently committed to the principle to take action on that basis alone. As we shall see, even in the instances cited by the OLC opinion, protection of other countries' nationals was

---

[49] Milton Offut, Protection of Citizens Abroad by the Armed Forces of the United States (Baltimore, 1928), *cited in* Brownlie, *supra* note 24, at 290.

not the sole or principal reason for acting.

Many uses of force by the United States may have had third-party beneficiaries that were not U.S. nationals, yet the protection of such foreign nationals was either not contemplated or not suggested as a justification for the action.[50] Likewise, the U.S. has taken military actions that were ostensibly for the benefit of foreign nationals, but were carried out pursuant to a U.N. authorization (e.g. the Congo, and, of course, Somalia) or pursuant to a mutual defense agreement (Vietnam).[51] As this paper is exploring uses of force to protect foreign nationals taken independently, outside such agreements and U.N. authorization, I have omitted discussion of these types of cases below.

What follows are some of the more familiar examples of U.S. military action this century where it has been suggested that protection of foreigners was a justification offered.

---

[50] *E.g.*, the U.S. action in Panama in late 1989 in which the lawfully elected President was restored to power, and the 1993-94 U.S. action in Haiti. Both of these actions arguably stabilized situations which might eventually have resulted in harm to other foreign nationals, although both of these actions rested on some manner of consent or invitation by the target country or (in the case of Panama) its putative representatives.

[51] There of course remains considerable disagreement among scholars and officials over whether the existence of a mutual defense obligation by itself gives the President authority to use force without Congressional authorization.

The Boxer Rebellion, China, 1900-1901

The United States sent forces to China in 1900 in response to threats to all foreigners there by the Boxers, the shorthand name given to members of the Chinese secret society called "The Righteous and Harmonious Fists." The Boxers had as their aim the purging of China of all foreigners, and to that end directed quite brutal terrorism against Christian missionaries and other non-Chinese, primarily in the northeastern provinces. As the Boxers' anti-foreigner actions continued and intensified, it became clear that the Chinese government was either unable or unwilling to control the Boxers and provide protection to foreigners within its borders.[52]

The U.S. responded, acting contemporaneously and in concert with Britain, France, Germany, Russia and Japan in mounting a relief operation. The multi-national expedition, which included 5000 U.S. forces sent by President McKinley,

---

[52] In fact, the Imperial Chinese government was at once unable *and* unwilling to prevent the attacks. While Chinese statements condemned the attacks, there was ample evidence that elements of the Chinese leadership, including the Dowager Empress Tz'u Hsi,, were actively supporting the Boxers. While the Chinese Government did not invite the intervention of the foreign powers, it ultimately viewed the U.S. presence as somewhat helpful, as it viewed U.S. involvement as supporting Chinese sovereignty and preventing dominance by other foreign powers, notably Russia and Japan.

relieved that portion of Beijing to which many of the non-Chinese (as well as some 3000 Chinese Christians) had fled. The force broke the Boxer seige of the foreign legations, and occupied Beijing from August 14, 1900 to September 7, 1901, when the Chinese signed a peace treaty, the undeniably one-sided "Boxer Protocol."

If the OLC opinion on Somalia meant to suggest that the U.S. action in China was to protect foreign nationals, it perhaps misstated the principle motivation and justification for the expedition to China. In a circular note of July 3, 1900, sent to various U.S. embassies and missions, Secretary of State John Hay noted the purpose of the U.S. action:

> The purpose of the President is, as it has been heretofore, to act concurrently with the other powers; first, in opening up communication with Pekin and rescuing the American officials missionaries, and other Americans who are in danger; secondly, in affording all possible protection everywhere in China to American life and property; thirdly, in guarding and protecting all legitimate American interests; and fourthly, in aiding to prevent a spread of the disorders to the other provinces of the Empire and a recurrence of such disasters.[53]

Likewise, President McKinley, in a July 23, 1900, letter to the Emperor of China explained, "The purpose for which we landed troops in China was the rescue of our legation from grave danger and the protection of the lives and property of

---

[53] *Foreign Relations of the United States 1901* (Appendix: Affairs in China) 12 (1902).

Americans who were sojourning in China in the enjoyment of rights guaranteed them by treaty and by international law."[54]

While the U.S. had expressed its concern over the treatment of "foreigners,"[55] to the extent that concern for foreigners was the motivation for U.S. intervention, it was the treatment of the *American* foreigners in China that plainly prompted the U.S. action.

Given that the threat to the Americans in Beijing was one shared by other non-Chinese, it was impossible for the Americans to act against that threat without collateral benefit to foreign nationals. That is far from suggesting, however, that the protection of non-Americans was a primary motivation for President McKinley's action, or that he would have ordered the action had no Americans been threatened. It is hardly precedent supporting any independent right for a President to use force without authorization from Congress for the protection of foreign nationals alone.

---

[54] *Id.* at 13.

[55] *See, e.g.*, Memorandum in response to the Russian chargé's oral communication made on August 28, 1900, to the Acting Secretary of State touching the purposes of Russia in China. Acting Secretary of State Alvey A. Adee writes:

> While we agree that the immediate object for which the military forces of the powers have been cooperating, viz, the relief of the ministers at Pekin, has been accomplished there still remain the other purposes which all the powers have in common…. These are: To afford all possible protection everywhere in China to foreign life and property; to guard and protect all legitimate foreign interests…[etc.].

Id. at 20.

The U.S. Intervention in the Dominican Republic, 1965

In April 1965 President Johnson without prior authorization from Congress ordered U.S. Marines into the Dominican Republic, as that country was engaged in a bloody civil war. The country was by all accounts in complete chaos following the overthrow of the President, Reid Cabral, by the rebel "Constitutionalists." The conflict between Cabral "Loyalists" and the Constitutionalists resulted in anarchy, and the absence of any government which could guarantee the safety of Americans or other foreigners in the country. Armed mobs roamed the streets, engaging in indiscriminate violence. As conditions worsened, the Marine contingent grew from 400 to over 20,000.[56]

As recounted in the OLC opinion, the President explained that he had ordered the action "to preserve the lives of American citizens and of a good many other nations-46 to be exact…."[57] U.S. Representative Adlai Stevenson offered the U.S. rationale to the UN Security Council:

> In the absence of any governmental authority, Dominican law authority enforcement and military officials informed our Embassy that the situation was completely out of control, that the police and the Government could no longer give any guarantee concerning the safety of Americans or of any

---

[56] The Dominican Republic Crisis 1965: Legal Aspects (The Ninth Hammarskjöld Forum of the Association of the Bar of the City of New York, 1966) 8.

[57] "An Assessment of the Situation in the Dominican Republic," 53 Dept. of State Bull. 19, 20 (1965), *cited in* OLC Somalia Opinion at 11.

> foreign nationals, and that only an immediate landing of United States forces could safeguard and protect the lives of thousands of Americans and thousands of citizens of some thirty other countries.[58]

A State Department memorandum justified the action as "essential to preserve the lives of foreign nationals-nationals of the United States and of many other countries."[59]

From the outset, it was clear that it was protection of American interests and lives which was the primary initial stated justification for the action. It soon became apparent, however, that the U.S. action was much more than a rescue action--if it was ever that--and that "preventing another Cuba" was an ultimate objective of the exercise, prompted by concern about the Communist character of the rebel force.[60] Whether the multiple rationales for the operation that emerged suggest that the protection of foreign nationals was never a serious focus of the operation

---

[58] 20 U.N. SCOR, 1196th meeting, 3 May 1965, para. 67, reprinted in Ronzetti, *Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity* 33, 34 (1985).

[59] Ronzetti, *supra* note 58, at 33.

[60] Secretary of State Dean Rusk explained:

> What began in the Dominican Republic as a democratic revolution was taken over by Communist conspirators who had been trained for and had carefully planned that operation. Had they succeeded in establishing a government, the Communist seizure of power would, in all likelihood, have been irreversible, thus frustrating the declared principles of the OAS. We acted to preserve the freedom of choice of the Dominican people until the OAS could take charge and insure that its principles were carried out.

Statement of Secretary of State Dean Rusk May 8, 1965 on communist subversion, The Dominican Crisis, Dept. State Pub. 7971, Inter-American Series 92 (1965), *reprinted in pertinent part in* The Dominican Republic Crisis 1965: Legal Aspects, *supra* note 56, at 9.

will no doubt be debated for years to come. A cynic might suggest that the purpose of the President's claim to be taking action to protect foreign nationals was to attract international support for an operation whose true purpose was likely to invite broad condemnation by the international community. A country whose citizens had been "saved" by American military might was unlikely to condemn the action.[61] What is clear is that the protection of foreign nationals was neither the sole or ultimately the principal motivation for the U.S. military action in the Dominican Republic.

The Indochina Rescue Operations, April 1975

In April 1975 President Ford, without authorization of Congress,[62] undertook three military operations, all related to the end of the U.S. presence in Indochina. All three involved evacuation of Americans, and in all three, non-Americans were also rescued.

---

[61] Indeed, Great Britain, for example, publicly thanked the United States for the assistance given its nationals. As Ronzetti notes, the Netherlands, while not taking a position on the rationale for the intervention, expressed approval "for the humanitarian aspects of the United States operation which led to the saving of many lives, including a number of Dutch nationals." 20 U.N. SCOR, 1203rd meeting, 7 May 1965, para. 4, cited in Ronzetti, *supra* note 58, at 34.

[62] It is fairly clear that all of the 1975 Indochina operations were in direct violation of Congressional prohibitions of appropriated funds being used for military operations in Southeast Asia. This, of course, does not settle the larger Constitutional question of whether the Congress can by its appropriations power preclude the President from fulfilling his Constitutional duties as Commander in Chief.

The first operation, done pursuant to urgent appeals from the South Vietnamese Government, involved the transport of refugees from Danang and other seaports to areas farther south in the country. The operation was undertaken as a result of attacks on South Vietnam by North Vietnamese forces. U.S. Naval units and Marines were authorized to approach the South Vietnamese coast to pick up refugees. An Amphibious Task Group, with 12 embarked helicopters and 700 Marines carried out the operation, which began on April 3, 1975. President Ford in his War Powers Resolution report to the Congress underscored the non-combat nature of the operation and his statutory authority under the Foreign Assistance Act of 1961 (as amended).[63]

As the operation was undertaken at the request of the South Vietnamese government, it was not an "intervention" in any true sense. Although U.S. forces were used, and were equipped for combat, President Ford described their mission as solely to assist in evacuation and maintaining order on board the vessels involved. While there were substantial numbers of South Vietnamese assisted, the mission also involved the rescue of U.S. nationals, and it is not all all

---

[63] Report Dated April 4, 1975 From President Gerald R. Ford to Hon. Carl Albert, Speaker of the House of Representatives, Consistent With Section 4(a)(2) of the War Powers Resolution, Relative to the Transport of Refugees from Danang, in *The War Powers Resolution: Relevant Documents, Reports, Correspondence*, Subcommittee on International Security, International Organizations and Human Rights of the Committee on Foreign Affairs, U.S. House of Representatives 47, 48 (May 1994 ed.).

clear that the mission would have been undertaken had it not included the protection of those U.S. citizens. [64]

On April 11, 1975 the President ordered the evacuation of Americans from Phnom Penh, as Communist forces were advancing on the city. Some 350 Marine ground combat troops and 36 helicopters evacuated 82 U.S. citizens. President Ford reported that the task force "was also able to accommodate 35 third country nationals and 159 Cambodians, including employees of the U.S. Government."[65] Even though the non-American evacuees outnumbered the Americans by more than two-to-one, the President did not claim the operation was for the purpose of rescuing the foreign nationals, and noted their rescue almost as an aside. While there were no combat injuries, and U.S. forces did not discharge any weapons, President Ford reported that the last elements of the force were fired upon. The President justified his actions as being "pursuant to the President's Constitutional executive power and authority as Commander-in-Chief.[66]"

As the Cambodian rescue operation was underway, the North Vietnamese were pressing forward into South Vietnam, in violation of the Paris Peace Accords. The President

---

[64] *Id.*

[65] Report Dated April 12, 1975, From President Gerald R. Ford to Hon. Carl Albert, Speaker of the House of Representatives, Consistent With Section 4(a)(2) of the War Powers Resolution, Relative to the Evacuation of U.S. Nationals from Cambodia, in *The War Powers Resolution: Relevant Documents, Reports, Correspondence, supra* note 63, at 49.

[66] *Id.* at 50.

ordered an evacuation of the remaining Americans in Saigon, "together with foreign nationals whose lives were in jeopardy."[67] As the situation worsened, the President ordered a final emergency helicopter evacuation on April 29th. Seventy evacuation helicopters and 865 Marines evacuated about 1400 U.S. citizens and 5500 third country and South Vietnamese nationals. Again, although the foreign nationals rescued outnumbered Americans by nearly four-to-one, the President predicated the action on the "direct and imminent threat to the remaining U.S. citizens and their dependents in and around Saigon."[68] Again he asserted his action was taken pursuant to his executive and Commander-in-Chief powers.

Although in these latter two episodes it could be argued that foreign nationals were the principal beneficiaries of the military missions, in neither did the President offer the "protection of foreign nationals" as justification for his actions. None of the three episodes involved solely the protection of foreign nationals, and in none of the three episodes did President Ford fail to stress that the operation included the rescue of Americans.

---

[67] Report Dated May 15, 1975, From President Gerald R. Ford to Hon. Carl Albert, Speaker of House of Representives, Consistent With Section 4(a)1 of the War Powers Resolution , Relative to the Evacuation of U.S. Citizens and Others From South Vietnam, in *The War Powers Resolution: Relevant Documents, Reports, Correspondence, supra* note 63, at 51, 52.

[68] *Id.*

The U.S. "Rescue Operation" in Grenada, October 1983

There were various justifications offered at various times by various officials for the U.S. intervention in Grenada. Principal among the reasons given, however, was always the protection of U.S. nationals, specifically concern about the safety of the U.S. students at St. George's School of Medicine there. In announcing the sending of troops into Grenada on October 23, President Reagan noted his principal reason for the action: "First, and of overriding importance, to protect innocent lives, including up to 1,000 Americans whose personal safety is, of course, my paramount concern."[69] While President Reagan had noted the protection of innocent lives generally, in which he included Americans, Secretary of State George Schultz, more plainly stated on 25 October that the primary concern was "the welfare of American citizens living on Grenada."[70] The President's letter to House Speaker O'Neill pursuant to the War Powers Resolution restated his concern about "the safety of innocent lives on the island, including those of

---

[69] Announcement of the Sending of U.S. Troops Into Grenada, in *American Foreign Policy Current Documents: 1983* 1398 (1985)

[70] Events Leading to Presidential Decision to Commit U.S. Forces to Grenada, *Id.* at 1401.

up to 1,000 United States citizens."[71] The U.S. statement to the Organization of American States on 26 October noted the U.S. concern for the safety of its citizens, but also noted that "The lack of respect for human rights and the degenerating conditions, of course, also posed a threat to other foreign nationals and, indeed, to the people of Grenada"[72] and noting, "Such humanitarian action has long been recognized as consistent with international law."[73]

By November 4th some 599 Americans and 121 foreigners had been evacuated from the country.[74]

While debate was intense over other reasons offered for the action, and whether the "protection of nationals" justification was wholly compelling, it was clear that this was the primary stated rationale of the United States. Although various references were made to the safety of non-U.S. citizens, perhaps in an effort to broaden international support for the action, protection of foreign nationals was never explicitly given as a legal justification in any of the U.S. statements on the matter.

---

[71] President's Report to Congress on Deployment of U.S. Troops in Grenada., *Id.* at 1407.
[72] U.S. Explanation of Its Actions and Objectives in Grenada, *Id.* at 1408, 1409.
[73] *Id.* at 1409.
[74] The Origins, Development, and Impact of U.S. Participation in the Grenada Mission (Address by the Dep. Sec. Of State (Dan) Before the Associated Press Managing Editors' Conference, Louisville, Ken., November 4, 1983, *Id.* at 1420.

The Liberian Rescue Operation, August 1990

The worsening civil war in Liberia had by June 1990 made more likely the eventual need to evacuate the U.S. citizens there. Toward that end the U.S. moved several Naval units off West Africa, and had advised all Americans in that country to leave immediately. The Assistant Secretary of State for African Affairs signaled that the U.S. was prepared to use military forces for the purpose of evacuation, but stressed there was "no intention of using these forces for any political ends: they are there to preserve American lives…. [We] will not intervene to stop the fighting or to influence the outcome of the conflict in any way."[75]

On August 5th U.S. Marines went ashore by helicopter and began the evacuation. When the operation ended several weeks later, some 1,000 non-Liberians had been evacuated from Liberia, including nationals from some 58 nations other than the U.S.[76]

---

[75] Prepared Statement by the Asst. Secretary of State for African Affairs (Cohen) June 19, 1990, in *American Foreign Policy Current Documents 1990* 800 (1991).

[76] Press Briefing by the President's Press Secretary (Fitzwater) August 5, 1990 (Extract), *Id.* at 803. The President in his War Powers Resolution letter to House Speaker Foley noted that as of 6 August (the day after the operation began), some 62 American citizens and a limited number of foreign nationals had been removed to U.S. ships. Report Dated August 6, 1990, From President George Bush to Hon. Thomas S. Foley, Speaker of the House of Representatives, Consistent With Section 4(a)(2) of the War Powers Resolution, Relative to the Use of United States Armed Forces in Liberia, in *The War Powers Resolution: Relevant*

The U.S. military action, although ultimately of great help to potentially endangered third-country nationals, was never justified on the basis of assisting those persons. The only rationale ever offered was the protection of U.S. citizens. The operation, which was a "pure" rescue operation, was conducted without hostilities of any sort, even though the operation did not have the formal approval of the Liberian government.[77]

Some Conclusions About U.S. Practice

While the examples of U.S. use of force for the protection of foreign nationals are not voluminous, from the foregoing instances one can draw several conclusions:

1. *The U.S. has asserted the right to use force to protect foreign nationals as justification for the use of military force.* The principle example of the U.S. offering this justification was the 1965 Dominican Republic intervention.

2. *The U.S. has not offered protection of foreign nationals as the sole justification for the use of force.* In each case discussed, including the Dominican Republic operation, the U.S. use of force was offered as one of two

---

Documents, Reports, Correspondence, supra note 63, at 146. See also, A. Arend & R. Beck, *International Law and the Use of Force* 102 (1993).

[77] A. Arend & R. Beck, *supra* note 76, at 102.

or more justifications for action.

3. *The U.S. has not used protection of foreign nationals as the primary justification for military action.* In those cases where use of force to protect foreign nationals was, or could have been, cited as justification for military action, the U.S. has not announced such rationale as its primary one. Always it has been at best secondary, after protection of our own nationals or some other vindication of American interests.

4. *The U.S. has chosen in some cases not to justify its use of force by the protection of foreign nationals, even when, as in the Indochina rescue operations, the protection or rescue of foreign nationals was a primary portion of a particular operation.*

5. *The most frequent pairing of the justification of protecting foreign nationals came with justification of the protection of U.S. nationals.*

6. *The President has used force to protect foreign nationals without prior authorization of the Congress, but has done so in situations where he has a stronger basis for unilateral action, specifically, his powers as Commander in Chief to protect U.S. nationals.*

7. *The U.S. Congress has not taken action to condemn the President's use of force in such situations*, although the lack of any precedent of Presidential use of force

solely for the protection of foreign nationals makes it impossible to predict what Congressional response might be in such a case. Given the lack of such a discrete use of force by the Executive, *Congress cannot be said to have acquiesced in the view that the Executive can use force for such a purpose without Congressional authorization.*

8. *The U.S. has used force to protect foreign nationals both where there has been consent from the national's government and/or the government of the target country, and in cases where such consent has been lacking.* The presence or absence of such consent does not appear to be have been critical in the decision whether force should be employed to protect foreign nationals.

What is apparent from the cases reviewed is that the Executive Branch, although willing to use force to protect foreign nationals, and willing to do without Congressional authorization, is apparently in practice wary of placing much emphasis on this rationale. Whether this wariness is a result of Executive unease of being able to so act within the Commander in Chief powers, or concern about the international law footing of such action, (or perhaps both), is not clear. What is clear that far from being the independent, stand-alone justification for Executive use of force suggested by the OLC opinion, the actual practice of

the U.S. suggests a much less important standing given to this rationale for military intervention.

THE USE OF FORCE TO PROTECT FOREIGN NATIONALS UNDER INTERNATIONAL LAW

The uneasiness that U.S. practice reflects might be a result of the general lack of acceptance that such use of force has in the international community in the post-U.N. Charter world. One must presume that the OLC opinion, however, when giving its legal imprimatur to the President's use of force for the protection of foreign nationals, was of the view that such use of force was valid under international law. The opinion correctly stressed the international law basis for the President's action in U.N. Resolution 794. It is nonetheless unfortunate given the breadth of the authority it suggests for the President to intervene on behalf of foreign nationals, that it did not discuss where any independent right to such intervention can be found in international law.

What is striking about the OLC opinion is the extent to which it claims a right of intervention far beyond that, for

example, delineated by Monroe Leigh in 1975.[78] Not only is the use of military force available for protection of third-country nationals, but it extends to Somalis within Somalia as well.[79] This language suggests that the Justice Department has not drawn a distinction between limited intervention for purposes of rescue, and a broader doctrine of intervention for humanitarian purposes.

Consideration of the possible bases under international law justifying intervention to protect foreign nationals will highlight the difficulties with the U.S. position.

Intervention as an Analog to Protection of One's Nationals Abroad

It is easy to try to justify such intervention as part and parcel of intervention to protect one's own nationals. Indeed, as noted above, the two are in practice frequently, if not always, connected. The basic concern underlying the intervention is often identical, as the threat to the U.S. national may be indistinguishable from that faced by his non-U.S. counterpart. The actual operation proposed for protecting the U.S. national may be indistinguishable from one mounted to protect the non-U.S. national. The extent to which the sovereignty of the nation into which forces are inserted has been violated may be identical in the two

---

[78] War Powers: A Test of Compliance, *supra* note 41.
[79] *See* OLC Somalia Opinion at 11.

circumstances. These similarities, alone, however, do not hide the basic differences in the legal underpinning of the two situations. Just as under domestic law it is difficult to consider an operation to protect foreign nationals as equating to "repelling a sudden attack," likewise it is difficult to define such an operation in international law as an act of self-defense under Article 51 of the UN Charter.

The U.S. has long taken the view that armed intervention to protect American lives and property is permissible as self-defense under Article 51 of the UN Charter. [80] That view, it must be acknowledged, is by no means accepted by the majority of states, and must be considered the minority position.[81] Nonetheless, even assuming such action is permissible under the Charter, it in no way follows that action to protect non-nationals is also. While one might be able to conceptually equate danger to one's nationals with the Charter's "armed attack" against

---

[80] The U.S., for example, strongly supported Israel's 1976 raid on Uganda's Entebbe airport to rescue its nationals. While conceding that there was a breach of Uganda's territorial integrity contrary to the U.N. Charter, the U.S. representative declared that "there is a well-established right to use limited force for the protection of one's national from an imminent threat of injury or death in a situation where the State in whose territory they are located is either unwilling or unable to protect them." U.N. Doc. S/PV 1949, 12 July 1976 at 31-32, *cited in* Ronzetti, *supra* note 58, at 38.

[81] *See* A. Arend & R. Beck, *supra* note 76, at 109, 110. Arend and Beck note, however, that "Of these states which have had both the *cause* and *capacity* to use force…, all appear consistently to have claimed their right to do so." "Such behavior," they note, " while perhaps not quantitatively significant, is nevertheless qualitatively so." *Id.* at 110. See also, Brownlie, *supra* note 24, at 298-301.

the state, it is impossible to do the same with a foreign national victim who does not have the same nexus with the state as the citizen. Indeed, if the action cannot be seen as *self*-defense, it would seem plainly to fall under the general prohibition of the use of force in Article 2(4) of the Charter.

Protecting Foreign Nationals as an Act of Collective Self-Defense

Another possible justification for the use of force to protect foreign nationals is collective self-defense, when the action is taken pursuant to a request by a third country for the U.S. to protect its nationals. In that situation, the action to protect the foreign nationals would be analogous to the action taken to protect one's own nationals, and would rest upon a much firmer legal position than action taken unilaterally to protect foreign nationals without the request of those nationals' governments. As noted above, by no means has the U.S. always sought the request or permission of third states when rescuing their nationals, even where, as in the Dominican Republic, that was a stated rationale for the operation.[82] This is no doubt in part out of concern that the blessing of the allegedly threatened national's home country might not be

[82] See n. 58, *supra*.

forthcoming.[83]

If the protection of foreign nationals is to be based on notions of collective self defense, such actions to be legal would need to be guided by the *Caroline* case principles of necessity and proportionality, that is, limited to strictly what was necessary to protect the lives at stake. While U.S. action in Liberia might be of such a character, few would argue that the prolonged presence of U.S. troops in the Dominican Republic would meet the *Caroline* criteria. Likewise such action taken in collective self-defense would need to meet the UN Charter requirement that the action be reported immediately to the Security Council.[84] Article 51 also arguably limits the inherent right of self-defense to that period "until the Security Council has taken measures necessary to maintain international peace and security." [85]

One difficulty with collective self-defense as a rationale is that it fails to provide a basis for taking action to protect a national of a state from his own government. It could not justify action taken to remove from Saigon Vietnamese loyal to the U.S., or efforts to protect Liberians seeking protection from their country's

---

[83] In Grenada, for example, it is highly unlikely that Britain would have given its blessing for the U.S. action, even though there was ample evidence that UK nationals on the island might have been at risk.
[84] "Measures taken by Members in the exercise of this right of [collective] self-defence shall be immediately reported to the Security Council…" UN Charter Art. 51.

civil war. The use of force to protect Somalis, as suggested by the OLC opinion, could not be based on collective self-defense.[86]

Collective self-defense by its nature also cannot address situations in which third countries, for political or other reasons, simply do not wish to see another country protect its nationals abroad, even at the expense of those nationals' lives. How then, can a state take action to protect threatened foreigners if the consent or request of the threatened nationals' home state is lacking?

Perhaps the only way to address situations where it is not possible to obtain such consent or request for reasons of politics, lack of communication or lack of time to consult, is to recognize a doctrine of "constructive consent." In those cases in which it is clear that any civilized nation would wish its nationals to be protected under the circumstances, and where they themselves would act to protect those nationals if it were possible, the consent should be presumed. This narrow legal fiction would allow nations with the capacity to assist foreign nationals to do so in urgent situations without waiting for the diplomatic process to work, by which time in cases of true emergency

---

[85] *Id.*

[86] If the Somali authorities acquiesced in the military action to protect Somalis it would thus not be intervention, in the true sense of the concept, as their would be consent for the action. If there were not consent, action taken to protect Somali nationals would be in opposition to the desires and sovereignty of Somalia, not pursuant to it.

terrible consequences might result.

While I believe such a narrow concept would be useful in those situations (perhaps few in the era of instant communication) where action to protect threatened foreign nationals must be immediate, it may be that a notion of "constructive consent" is at odds with the International Court of Justice's decision in *Nicaragua v. United States of America*.[87] Though the I.C.J. did not address the issue of using force for the protection of foreign nationals, it did stress that "There is no rule in customary international law permitting another State to exercise the right of collective self-defence on the basis of its own assessment of the situation" and that the victim state must declare itself a victim.[88] Moreover, the Court noted that in customary international law "there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack."[89] While the Court's decision is not binding on those not party to the case, to the extent the decision actually reflects customary international law, it may preclude acceptance of a doctrine of "constructive consent." However, if the doctrine were applied as narrowly as I suggest, in situations as dire and immediate as those

---

[87] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. Rep. 14 (Judgement).
[88] *Id.*, at para. 195.

contemplated, it is unlikely that there would be condemnation of such actions, particularly if they were ratified as soon as possible after the fact by the threatened nationals' home state.

Protection of Foreign Nationals As Humanitarian Intervention

Almost all operations to rescue or protect foreign nationals have a humanitarian element, and this fact understandably propels the state wishing to use force in such situations toward considering arguments of humanitarian intervention.[90] Humanitarian intervention, as the term is used by many, connotes the protection of a target state's citizens from *large-scale* human rights violations *in or by the target state*.[91] This is not always the case where the U.S. might seek to protect foreign nationals. For example, they may be--and perhaps usually are--*third-country* nationals in a hostile state, such as the European diplomats in China in 1900. Many such situations are not on a large scale.

The reason "humanitarian intervention" has been defined so narrowly is to avoid the obvious abuses that a broadly

---

[89] *Id.*, at para. 199.
[90] *See, e.g.*, U.S. Explanation of its Actions and Objectives in Grenada, *supra* note 72, at 1408, 1409.
[91] See, e.g., A. Arend & R. Beck, *supra* note 76, at 113. They define humanitarian intervention as "the use of and force by a state (or

defined doctrine might invite. Efforts to formulate a doctrine of humanitarian intervention are usually directed at setting a "floor" for action high enough to preclude such abuses. Indeed, it is this "slippery slope" problem (and the constraints of the Charter) which have prevented acceptance of unilateral intervention for this purpose, even in large-scale humanitarian catastrophes. If the slippery slope exists when the threshold for action is contingent on massive suffering, it surely exists for more limited rescue actions.

Louis Henkin has argued that there exists a narrow humanitarian exception of sorts to Article 2(4) of the U.N. Charter. This exception allows a nation to use force, not only for protection of its own nationals, but pursuant to a general "right to liberate hostages if the territorial state cannot or will not do so."[92] While Henkin's narrow formulation undoubtedly seeks to avoid the "slippery slope" of a broader doctrine of humanitarian intervention, I believe that it suffers from being too narrow, a defect that I believe would result in its being applied too broadly.

There are many situations—if not most—where foreign nationals in need of rescue are not hostages or prisoners, but rather are caught in cross-fire (as in Liberia) or

---

states) to protect citizens of the target state from large-scale human rights violations there."

otherwise trapped by circumstances. Indeed, few of the instances described above which involved the United States were true hostage situations. Given the extreme narrowness of Henkin's hostage exception, there might well be strong incentive for states to interpret it in an overbroad fashion, not only rendering the term "hostage" meaningless (e.g., by including those "hostage" to a circumstance), but thereby ultimately inviting the same sort of slippery slope problems Henkin seeks to avoid.

It has been observed that there have been few, if any, instances of true humanitarian intervention by states since the Covenant of the League of Nations and the Kellogg-Briand Pact.[93] On the other hand, there have been significant examples of states *claiming* to intervene for pure humanitarian reasons, including the Egyptian intervention in Palestine in 1948, the Indian intervention in East Pakistan in 1971, and the Vietnamese invasion of Kampuchea in 1978. Perhaps the most notorious example of claimed humanitarian intervention was Hitler's 1939 invasion of Czechoslovakia to protect the German-origin population there from "wild excesses."[94] If the U.S. resorts to humanitarian justifications for armed intervention to protect foreign

---

[92] L. Henkin, Use of Force: Law and U.S. Policy, in *Right v. Might: International Law and the Use of Force* 41-42 (1991).

[93] Ronzetti, *supra* note 58, at 91. (*See also*, A. Arend & R. Beck, *supra* note 76 at 135; they also conclude that "genuine instances of

nationals, it must be prepared to entertain claims from the other nations of the world who will find such a justification convenient for their intervention on behalf of Serbians in Bosnia, ethnic Russians in the former Soviet Republics, and the like. For these reasons, humanitarian intervention when undertaken is probably best left to the U.N. Security Council.

Absent a raw doctrine of necessity, then, there is little satisfactory international law basis for armed intervention on behalf of threatened foreign nationals that covers every possible situation. While this apparent gap in the legal regime of the use of force might trouble some, one could argue that it is in fact not a "gap" at all, but rather serves to encourage states to take action under the auspices of the Security Council or, if they should act on their own, to do so with some other more accepted justification as their primary one. This, of course, has been the U.S. practice.

WHAT SHOULD THE U.S. POLICY BE?

What then should the U.S. position be? There will surely be instances arising again where the U.S. will feel

---

humanitarian intervention have been rare, if they have occurred at all.")

[94]Ronzetti, *supra* note 58, at 91.

compelled to use its military might to alleviate threats to nationals of other nations. Indeed, *not* acting to assist threatened foreign nationals would have serious consequences of loss of prestige and ultimately could be reciprocated in the care given our nationals abroad by other nations. Imagine the U.S. helicopters leaving Liberia in 1990 without those non-American civilians who were just as threatened as were the Americans. Consider the fate of those non-Americans we evacuated from Indochina, had we instead felt legally compelled to leave them behind. These sorts of emergency situations will ultimately demand that the U.S. extend its hand to those threatened, so the U.S. should have a well-grounded and consistent policy and view of the law, not only to guide its actions in the first place, but also to defend its actions if criticism results.

Rather than being guided solely by *realpolitik*, however, and thus force ourselves to accept the same behavior from the other nations of the world, the U.S. would benefit from articulating a legal position allowing as well-defined a scope of action as possible in acting to protect foreign nationals. The U.S. should avoid the illogical "self-defense" argument (unless acting in collective self-defense), and should shun a "humanitarian" justification for its actions. While U.S. practice has already developed the outlines of a position, it has done so haphazardly and

somewhat erratically, and apparently driven by its defenses of actions already taken.

It seems to me the Monroe Leigh formulation is too constraining. Limiting the beneficiaries of our rescue actions to those who actually facilitate the rescue or protection of Americans would still result in many foreign nationals left unprotected when U.S. forces were able to afford them relief. Many of those evacuated from Indochina and Liberia were probably not actually "facilitating" the rescue of Americans at all. I believe rather than trying to draw difficult and unworkable distinctions that attempt to cover every case (e.g., who is facilitating the rescue, and who is simply standing by), the focus of U.S. policy should be on avoiding as much as possible those evils which Article 2(4) seeks to guard against: namely, intrusions upon territorial integrity and political independence.

Any action taken to assist foreign nationals in a state that has not offered its consent to force being used for that purpose does to some extent impinge on that state's territorial integrity, if not political independence as well. How can this be minimized when seeking to protect threatened foreign nationals?

I would offer the following general principles to be followed when considering the use of force to protect foreign nationals:

1. Absent a mutual defense arrangement or request from a threatened national's state for the U.S. to act in collective self-defense,[95] the U.S. should not take action solely to protect foreign nationals without Security Council authority or the host country's consent.

2. If the contemplated U.S. military action has as a primary purpose the rescue or protection of U.S. citizens, U.S. forces may extend their protection to third-country nationals when such action is necessary to effect the protection of U.S. nationals, or in other cases if such protection does not result in greater violations of the host country's sovereignty than would be the case were we acting solely to protect our nationals, and the time needed to effect the operation is not significantly extended by the protection of such nationals.

This formulation recognizes the desirability of acting where possible pursuant to previously agreed-upon arrangements (consent, Security Council resolutions, mutual defense treaties) and in situations not involving U.S. nationals or interests, pursuant to requests from the threatened nationals' state. This half of the policy would act to

[95] And this in rare circumstances might involve "constructive consent," discussed earlier.

deter abuses which could occur were there no constraints on using force to protect foreign nationals or were the relatively amorphous and easily feigned "humanitarian" concerns the only guide. The second half of the policy would tie other protective actions to (presumably) legal uses of force under the UN Charter, principally the protection of U.S. nationals. When coinciding with such uses of force the policy would allow protective actions, without the rather strained and fictional determination of whether the action was "facilitating" the rescue of Americans or was otherwise inseparable from it. It would, however, seek to protect the Article 2(4) values of territorial integrity and political independence, by effectively limiting the protective action to no greater intervention than would occur were foreign nationals not being protected.

These same principles would also neatly mirror the likely limits of Executive action without Congressional authorization. While a protective operation undertaken as collective self-defense pursuant to another government's request might exceed the President's Commander in Chief powers, the bulk of actions to protect foreigners would undoubtedly continue to be taken in tandem with actions to protect U.S. nationals, within the traditional scope of action of the Executive. The limits implicit in the

formulation above on expansion of an operation beyond what is needed to protect U.S. nationals, would ensure the President did not "bootstrap" a more extensive military operation on pretense of protecting U.S. nationals.

CONCLUSION

The U.S. will surely be called upon again to protect the nationals of other countries because of its military strength, worldwide presence and perceived willingness to use force in defense of its interests. Again this month violence has broken out in Liberia, and again the U.S. military is looked to, not only by stranded Americans, but also by other foreigners there, for protection and safe passage out of harm's way. As the U.S. seeks to act responsibly and in accordance with international law, the first step should be to formulate and enunciate a limited doctrine for using force to protect or rescue non-U.S. citizens. As the President seeks to use force within his powers as Commander in Chief, he should seek the greater confidence and freedom of action afforded by a clear statement on the extent to which the Executive can use force to protect foreigners in peril. The U.S. use of force to protect foreigners may well be condemned by other nations no matter how limited and defined the action may be. Such action, though, is infinitely more defensible when it is executed in accordance with established U.S. practice and consistent with a coherent and well-articulated view of international law under the UN Charter.

17 51NPS TH 1427
1/99 22527-200

DUDLEY KNOX LIBRARY
3 2768 00360403 4